

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE CITY OF ST. PAUL

In the Matter of Adverse Action Against
All Licenses Held By Vone X. Moua &
Mee Lee Moua , d/b/a Malina's Sports
Bar

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

This matter came on for hearing before Administrative Law Judge M. Kevin Snell (the ALJ) on April 13, 2010, at the Ramsey County Courthouse, 15 West Kellogg Boulevard, St. Paul, Minnesota. The OAH record closed on April 26, 2010, upon receipt of the replies to the parties' post-hearing briefs and closing arguments.

Virginia D. Palmer, Assistant St. Paul City Attorney appeared at the hearing as attorney for the City of St. Paul (the City). The Licensees, Vone X. Moua and Me Lee Moua appeared on their own behalf, without legal counsel.

STATEMENT OF THE ISSUES

1. Did the City prove by a preponderance of the evidence that, on November 20, 2008, Licensees violated condition number two of their license by failing to immediately produce the video surveillance recordings of the establishment?

Yes, the ALJ finds that the City did meet its burden of proof on this issue.

2. Did the City prove by a preponderance of the evidence that, on January 30, 2010, Licensees violated condition number two of their license by failing to immediately produce the video surveillance recordings of the establishment?

No, the ALJ finds that the City did not meet its burden of proof on this issue.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Licensees, Vone X. Moua and his wife Mee Lee Moua, have held liquor on-sale and restaurant licenses issued by the City prior to 2006 and do business as Malina's Sports Bar and Grill ("Malina's").¹

2. The licenses were originally granted subject to certain enumerated conditions, including condition number two, which states that Licensees must "maintain video surveillance cameras inside and outside the establishment."²

3. On November 20, 2006, the City imposed additional requirements as part of Licensees' condition number two. As amended, condition number two now reads as follows :

The license holder shall maintain video surveillance cameras inside and outside the establishment. The video recordings shall be kept by the license holder for at least thirty (30) days and produced immediately upon request by the St. Paul Police Department or the Office of License, Inspections, and Environmental Protection.³

4. One reason for the requirement of immediate access to the recordings from the security cameras is to ensure the integrity of the recording. This precludes anyone from having the time to alter the original recording, such as the dates or times of the recording.⁴

5. Because of reliability problems with the videotape recording system utilized by Licensees between 2006 and April of 2008, Licensees advised the St. Paul Department of Safety and Inspections (DSI) that they would be replacing the system.⁵ Licensees replaced the videotape system with a digital system whereby digital recordings from eight security cameras reside on a computer located at the establishment.⁶ The only way to copy the recordings is to utilize the USB port on the computer. There is no disc drive on the computer that would allow copying of the recordings directly to a disc. Therefore one must utilize either a USB portable flash drive to copy the recordings or a separate portable disc drive that allows copying.⁷ Licensees do not have a separate portable disc drive.⁸

¹ Testimony of Christine Rozek, Deputy Director, St. Paul Department of Safety and Inspections (DSI); Test. of Vone X. Moua; Exhibit 1.

² Test. of C. Rozek; Ex. 11.

³ Ex. 10; the Office of License, Inspections, and Environmental Protection is now known as the Department of Safety and Inspections (DSI).

⁴ Test. of C. Rozek.

⁵ Ex. 1; Test. of V. Moua and Mee Lee Moua.

⁶ *Id.*

⁷ Test. of Kelly Herven, Civilian Criminalist and forensic video analyst with the St. Paul Police Department Crime Laboratory; Test. of V. Moua and M. Moua.

⁸ Test. of V. Moua and M. Moua.

6. Past practice by the Licensees and the police has been to have one of two civilian forensic video analysts from the police Crime Laboratory come out to Malina's and make copies of the digital recordings.⁹ One particular analyst made copies of recordings as required and necessary three times in 2009, and a number of times in 2008. The copying process takes between fifteen minutes and an hour and a half, depending on how many digital files are being copied and the size of each file. The number of files chosen depends on and corresponds to the number of surveillance cameras chosen, and the size of each file depends on the length of the relevant recording.¹⁰

7. Licensees make copies of surveillance footage by taking the Malina's computer home and utilizing their home computer to make DVD copies.¹¹

8. The expectation and understanding of DSI regarding the "immediate" production requirement of condition number two is that the Licensees must provide a copy of surveillance recordings within a week of a request by DSI and immediate on-the-spot copying upon the request of the police.¹²

9. Licensees are aware of the condition but have been operating under the belief that they were required to provide access to the digital files within a "reasonable time" after a request from law enforcement or DSI, but no later than 30 days.¹³

10. To access the digital files of the surveillance camera recordings, one must know the password. To ensure the integrity of the recordings, Licensees have never provided the password to their employees. One of the Licensees must be available to access the applicable digital files on the computer.¹⁴

November 20, 2009 Incident

11. In November 2009, Licensees went to Cancun, Mexico, on their first vacation in the approximately nine years that they have owned Malina's. They returned on November 21, 2009.¹⁵

12. Early in the morning on November 20, 2009, there was an incident at Malina's involving a fight that resulted in damage to mirrors, plumbing and equipment behind the bar, all in excess of \$3,000.00. Police responded at approximately 12:45 a.m., found a victim with visible injuries, and arrested a suspect. The responding officer requested that the bartender show him the surveillance camera recordings. The bartender replied that he did not have the password that would allow him to do so.¹⁶

⁹ *Id.*; Test. of Kelly Hervin.

¹⁰ Test. of K. Hervin.

¹¹ Test. of M. Moua.

¹² Test. of C. Rozek.

¹³ Test. of V. Moua and M. Moua.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Test. of Patricia T. Englund; Ex. 3.

13. On November 23, 2009, Sergeant Patricia T. Englund from the City Police Homicide Unit called Vone Moua and explained that she needed to recover the surveillance footage that recorded the November 20, 2009 incident. Mr. Moua and Sgt. Englund agreed to meet at 2:00 p.m. on November 24, 2009, for recovery of the surveillance footage.¹⁷

14. On November 24, 2009, Sgt. Englund, together with Kelly Hervin, the police forensic video analyst, arrived at Malina's at 2:00 p.m. and met with Mee Moua. Sgt. Englund asked that Ms. Hervin recover the surveillance footage beginning at 11:30 p.m. on November 19, 2009, through 1:00 a.m. on November 20, 2009. Ms. Hervin went directly to the monitoring/equipment room and proceeded to recover the necessary footage. It took Ms. Hervin between a half hour and 45 minutes to copy the relevant one and one half hour of security camera files to a DVD, which she gave to Sgt. Englund.¹⁸

15. Mrs. Moua told Sgt. Englund that she and her husband had reviewed the surveillance footage that morning and did not recognize any of the suspects, so she did not think they were regular customers. Sgt. Englund told Mrs. Moua that her licensing conditions require that she provide a copy of surveillance footage upon request by police and that it should not be incumbent on police to retrieve the footage.¹⁹

January 30, 2010 Incident

16. On January 30, 2010, Officer Andrew Shanley responded to a disturbance call from Malina's of a man with a gun at approximately 1:46 a.m. Upon arrival at Malina's it appeared there had been a brawl involving approximately 30 people. Additional police backup arrived and separated the parties, requiring everyone to place their hands on the wall. Then the officers searched each individual to find the person with the gun. When Officer Shanley attempted to search one individual, he tried to elude Officer Shanley. Officer Shanley and another officer had to physically take the man down to the floor to handcuff him. That individual and another were arrested and transported to jail. One was arrested for Disorderly Conduct and Obstructing the Legal Process, and the other was arrested for Gross Misdemeanor Illegal Possession of a Firearm.²⁰

17. Mr. Moua and an employee were working as bartenders. When the fight broke out, one of the suspects who was arrested threw a bottle that hit the employee bartender in the head, causing an injury that required nine stitches and two days in the hospital.²¹

18. Officer Shanley asked Mr. Moua to show him the surveillance footage of the fight. Mr. Moua showed Officer Shanley the location of all of the interior surveillance

¹⁷ Exs. 4-7; Test. of M. Moua.

¹⁸ Ex. 3; Test. of K. Hervin and P. Englund.

¹⁹ Ex. 3.

²⁰ Ex. 4; Test of Officer Andrew Shanley.

²¹ Ex. 4; Test of M. Moua.

cameras. Then Officer Shanley and Mr. Moua sat down together and viewed each frame or clip of all eight video cameras. Mr. Moua asked Officer Shanley if he had a memory stick to use for making a copy and Officer Shanley replied that he did not. Officer Shanley told Mr. Moua to make sure that the recordings they had just viewed were not deleted and that an investigator would contact him.²²

19. Licensees made copies of the January 30, 2010, surveillance footage and called both Officer Shanley and DSI. Licensees received a response from neither. Since they received no response to their telephone calls, on February 9, 2010, Mr. Moua sent a letter to Officer Shanley with a copy to DSI requesting that someone come to retrieve the copy of the January 30, 2010, surveillance footage. He also requested a case number for the incident and wondered when someone from the gang task force would contact him.²³

20. Mr. Moua then took the copy of the January 30, 2010, surveillance footage to the Western District police station on Hamline Avenue to drop it off. Staff at that location sent him to the St. Paul Police Headquarters on Grove Street. Headquarters staff sent him back to the Western District police station where he was able to leave the copy.²⁴

21. Officer Shanley received the copy of the January 30, 2009, surveillance recording in his mailbox sometime between February 9, 2010, and February 14, 2010.²⁵

Procedural Findings

22. Christine Rozek, the Deputy Director of DSI, routinely reviews police reports for licensing implications. Ms. Rozek reviewed the reports submitted by the police officers regarding the visits to Malina's on November 24, 2009, and January 30, 2010.²⁶

23. After reviewing the police reports and consulting with the City Attorney, Ms. Rozek recommended a fine of \$500.00. This fine is based on the alleged violations of the conditional license being a first violation pursuant to the penalty matrix contained in St. Paul Legislative Code Section 310.05(m)(1).²⁷

24. On February 22, 2010, the City of St. Paul sent a Notice of Violation to Licensees, alleging a violation of license condition two and imposing a penalty of \$500.00.²⁸ Licensees appealed the Notice of Violation and requested an administrative hearing.²⁹

²² *Id.*; Test. of A. Shanley.

²³ *Id.*, Ex. 8.

²⁴ Test. of M. Moua.

²⁵ Test. of A. Shanley.

²⁶ Test. of C. Rozek.

²⁷ *Id.*

²⁸ *Id.*; Ex. 5.

²⁹ Ex. 6.

25. On March 9, 2010, the City issued a Notice of Administrative Hearing to the Licensees to be held on April 13, 2010, for alleged licensing violations that occurred on November 20, 2009, and January 30, 2010.³⁰

Based on these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Saint Paul City Council and the Administrative Law Judge have jurisdiction in this matter pursuant to the St. Paul Legislative Code § 310.05 and Minn. Stat. § 14.55 (2008).

2. The hearing was conducted in accordance with the requirements of Minnesota Statutes sections 14.57 to 14.62 and applicable portions of the procedures set forth in section 310.05 of the Saint Paul Legislative Code.

3. The City has given proper notice of the hearing in this matter and has fulfilled all relevant procedural requirements of law and rule.

4. The City bears the burden in this matter of proving by a preponderance of the evidence that adverse action is warranted due to violations of condition number two of Licensees' license.

5. Chapter 310 of the Saint Paul Legislative Code contains general provisions relating to licenses issued by the City. Section 310.06(b)(5) and (6) of the Saint Paul Legislative Code specifies that adverse action may be taken when "[t]he licensee or applicant has failed to comply with any condition set forth in the license, or set forth in the resolution granting or renewing the license" or "[t]he licensee or applicant . . . has violated . . . any of the provisions of . . . any . . . ordinance . . . reasonably related to the licensed activity"

6. Adverse action is defined in Saint Paul Legislative Code § 310.01 to include the revocation or suspension of licenses and the imposition of fines.

7. Section 2.02 of the Saint Paul Legislative Code specifies that "[w]ords and phrases shall be construed so far as possible in their plain, ordinary and usual sense except that technical words and phrases having a peculiar and recognized meaning in law shall be understood according to their technical import."

8. The City has proven by a preponderance of the evidence that, on November 20, 2009, the Licensees failed to comply with condition number two of their liquor license requiring them to produce surveillance camera recordings immediately upon request of the police.

³⁰ Ex. 7.

9. The City has failed to prove by a preponderance of the evidence that, on January 30, 2010, the Licensees failed to comply with condition number two of their liquor license requiring them to produce surveillance camera recordings immediately upon request of the police.

10. The St. Paul Legislative Code provides that, for a first violation, the presumptive sanction for violation of a condition placed on the license is a fine in the amount of \$500.³¹ The City Council may deviate from this penalty in an individual case where the Council finds that substantial and compelling reasons exist making it more appropriate to do so.³²

11. There are no substantial or compelling reasons in the record to justify a deviation from the presumptive penalty for the November 20, 2009, violation.

12. The ALJ adopts as Conclusions any Findings that are more appropriately described as Conclusions, and as Findings any Conclusions that are more appropriately described as Findings.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

Based upon these Conclusions, the Administrative Law Judge respectfully recommends that the St. Paul City Council:

- 1) AFFIRM the presumptive \$500.00 fine against the Licenses based on the their failure to comply with Condition Number Two of their liquor license on November 20, 2009;
- 2) DISMISS the allegation that Licensees failed to comply with Condition Number Two of their liquor license on January 23, 2010.

Dated: May 25, 2010

s/M. Kevin Snell

M. Kevin Snell

Administrative Law Judge

Reported: Digitally Recorded

³¹ St. Paul Legislative Code § 310.05(m)(1).

³² *Id.*

NOTICE

This report is a recommendation, not a final decision. The St. Paul City Council will make the final decision after reviewing the record and may adopt, reject or modify the Findings of Fact, Conclusions and Recommendation contained herein. Pursuant to Section 310.05 of the St. Paul Legislative Code, the City Council's final decision shall not be made until this Report has been made available to the parties to the proceeding and the Licensees has been provided an opportunity to present oral or written arguments alleging error on the part of the Administrative Law Judge in the application of the law or the interpretation of the facts and an opportunity to present argument relating to any recommended adverse action. The Licensees and any interested parties should contact Shari Moore, Saint Paul City Clerk, 290 City Hall, 15 West Kellogg Boulevard, St. Paul, MN 55102, to ascertain the procedure for presenting argument.

MEMORANDUM

The evidence in this matter suggests that neither the Licensees nor the City have been operating with a correct understanding of the meaning of the phrase “produced immediately” in the last portion of the second condition that was placed on Licensees’ license on November 20, 2006. The condition relates to the digital recordings from eight security cameras located within and without the Licensees’ premises. These digital recordings reside on a computer in the establishment. The sentence in question is:

The video recordings shall be kept by the license holder for at least (30) days and produced immediately upon request by the Saint Paul Police Department or the Department of Safety and Inspections.

The Department of License and Inspections and one police witness believe that the words “produced immediately” means that the license holder is required to provide a copy of all recordings immediately, at the license holder’s expense. The Licensees believe that the requirement means that they must provide a copy within a reasonable time after the request. The Administrative Law Judge concludes that neither belief is warranted by the plain meaning of the language of condition two.

The term “produce” is not defined in the City Code, but the Code indicates that words and phrases are to be construed in accordance with their “plain, ordinary and usual sense” to the extent possible. Add citation “Produce,” in the context of the license condition, is a *transitive verb* and is defined to mean “to offer to view or notice”; “to make available for public exhibition or dissemination”; or “to cause to have existence or to happen: bring about.”³³

There are two problems with the City’s interpretation of the requirement that the recordings be “produced immediately upon request.” First, the interpretation is

³³ Merriam Webster On Line Dictionary, <http://www.merriam-webster.com/dictionary/produce>.

inconsistent with the plain meaning of the word “produce.” Second, it is technologically impossible to immediately copy the recordings from eight cameras. The police department’s own forensic video analyst testified that the copying process takes between fifteen minutes and an hour and a half, depending on how many digital files are to be copied (i.e., the number of camera files chosen) and the sizes of the files. For example, it took her between a half hour and 45 minutes to copy the November 20, 2009, files. A license holder cannot reasonably be expected to do the impossible.

However, the Licensees can reasonably be expected to immediately “produce,” or make available for immediate viewing, the video recordings at the request of the police. The situation on January 30, 2010, demonstrated how the condition was designed to work: when the police promptly responded to an incident of violence at the bar, the officer was able to immediately sit down with the Licensee and view the video recordings surrounding the time of the incident. The video viewing procedures that were followed on January 2010, and the prompt witness interviews that were conducted, permitted law enforcement officers to have as much information as possible in order to identify and apprehend suspects. This is precisely what they were able to do on January 30, 2010: identify and apprehend a suspect.

Conversely, law enforcement was not able to secure similar necessary information on November 20, 2009, because the employees working at the bar while Licensees were on vacation did not have access to the necessary security codes to permit immediate viewing of the video files. Condition number two of the license was violated in this instance.

The Administrative Law Judge concludes that the City’s interpretation of the requirement that video recordings be “produced immediately” is inconsistent with the ordinary meaning of the word “produce.” The Administrative Law Judge also concludes that the Licensees’ interpretation of “produced immediately” is inconsistent with the ordinary meaning of the word “immediately.” Making a copy of security video files available within a “reasonable time” is an incorrect interpretation of the plain language of the condition, particularly when that interpretation also includes the belief that a “reasonable time” is within 30 days. The condition clearly requires that all security surveillance files must be kept for at least 30 days without being deleted or recorded over. At any time within that 30-day period, law enforcement and DSI must be given immediate access to those security surveillance files. Finally, there is no language in condition number two that requires Licensees to provide a copy of the security video files, whether it be by USB flash drive, compact disc or otherwise.

Conclusion

Because the City did show by a preponderance of the evidence that the Licensees failed to comply with license condition number two on November 20, 2009, the Administrative Law Judge recommends that the City affirm this violation and impose the presumptive \$500.00 fine upon the Licensees. Because the City failed to prove by a preponderance of the evidence that the Licensees failed to comply with license

condition number two on January 30, 2010, the Administrative Law Judge recommends that the City dismiss this alleged violation.

M. K. S.